No. 86-1226

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOHN MORRELL & CO.,

Petitioner,

v.

LOCAL UNION 304A OF THE UNITED FOOD AND COMMERCIAL WORKERS, AFL-CIO AND CLC; and UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO AND CLC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION

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* The statement of Parties to the Proceedings pursuant to Supreme Court Rule 28.1 appears at page ii of the Petition. There have been no changes to the parties in the interim.

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Respondents evade the question presented for review. Most of their brief is devoted to a demonstrably erroneous claim that the issue of whether *Buffalo Forge* should be overruled is not squarely before this Court. When respondents do address the merits of Morrell's petition, they do little more than urge blind adherence to *stare decisis*. They offer no reason why this Court should decline to reconsider a decision that experience has shown to be at odds with sound national labor policies previously recognized by this Court. Accordingly, the petition should be granted.

I. This Case Squarely Presents The Issue Of Whether *Buffalo Forge* Should Be Overruled.

Respondents' principal argument is that "this case does not squarely raise the question petitioner attempts to tender to this

Court." (Resp. at 5) That argument ignores both the clear holding of the Eighth Circuit below and the deep division between the majority and dissenters in *Buffalo Forge*.

A. The Eighth Circuit Held That *Buffalo Forge* Was Controlling.

The Eighth Circuit began its analysis by focusing on "the congressional limitation on a federal court's jurisdiction to issue orders enjoining a strike, set out in section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104." (A-4, 804 F.2d at 459) Relying on *Buffalo Forge*, the court explained that "a *Boys Markets* injunction may not issue unless the strike has been triggered by an arbitrable dispute." (A-5, 804 F.2d at 459) Concluding that there was "no evidence" that the strikes were "over an arbitrable grievance," the Eighth Circuit held that the strikes at issue were sympathy strikes and therefore barred by *Buffalo Forge*. (A-10, 804 F.2d 462) In short, the court squarely rested its decision on *Buffalo Forge*, and Morrell has squarely presented to this Court the question of whether *Buffalo Forge* should therefore be overruled.

B. *Buffalo Forge* Was Not Unanimous In Any Respect.

Respondents also argue that this Court's sharp division in *Buffalo Forge* does not extend to the facts of this case because the Court in *Buffalo Forge* was supposedly "*unanimous* in holding that Norris-LaGuardia precludes an injunction where the employer's right to invoke arbitration is not established." (Resp. at 8) (emphasis in original) Even if respondents were correct in their assertion that Morrell cannot seek arbitration, nothing in either the majority or dissent in *Buffalo Forge* suggests that any member of this Court attached any significance to whether the employer could initiate arbitration. The majority concluded that preliminary injunctions against sympathy strikes were not necessary because "[t]he *quid pro quo* for the employer's promise to arbitrate was the union's obligation not to strike over issues that were subject to the arbitration

machinery." 428 U.S. at 407. Thus, the majority's obvious concern was whether an injunction was necessary to enforce the parties' agreement to resolve industrial disputes through arbitration instead of economic warfare, not whether the employer could initiate the process.

Justice Stevens, writing for the dissenters, made clear that their quarrel with the majority was that a refusal to enjoin sympathy strikes would frustrate arbitration and deprive employers of the benefit of their bargain. Again, the focus was on the employer's agreement to arbitrate in return for the union's no-strike pledge—not on whether the employer could itself demand arbitration. As the very first line of the dissent states: "A contractual undertaking not to strike is the union's normal *quid pro quo* for the employer's undertaking to submit grievances to binding arbitration." 428 U.S. at 413. For this reason, "[i]f the sympathy strike in this case violates the Union's no-strike pledge, the same public interest in an enforceable *quid pro quo* is present here as in *Boys Markets.*" 428 U.S. at 419. There is simply nothing in the dissent to suggest that enforcement of the union's no-strike promise should be dependent in any way on whether the employer can initiate arbitration.[1] This case thus plainly presents the issue that divided this Court five-to-four in *Buffalo Forge:* "whether a federal court may enjoin a sympathy strike pending the arbitrator's decision as to whether the strike is forbidden by the express no-strike clause." 428 U.S. at 399.

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[1] Justice Stevens' observation that an injunction may be inappropriate where an arbitration clause "does not clearly extend to the question whether a strike violates the agreement" (428 U.S. at 426-27 n.20, *quoted in* Resp. at 8), does not require that the employer be able to invoke arbitration. Rather it merely highlights the common sense proposition—with which Morrell agrees—that an injunction is inappropriate if the scope of the no-strike clause cannot be determined through arbitration. Here, it is undisputed that the parties' arbitration clause "clearly extend[s] to a question whether a strike violates the agreement." Respondents concede, as they must, that they have filed a grievance that "put in issue the question whether the employees' actions had violated the no-strike provision of the agreement." (Resp. at 3)

Moreover, the Court's opinion in *Boys Markets*, from which *Buffalo Forge* took its departure, in no way suggests that the employer must be entitled to initiate arbitration in order to obtain a preliminary injunction.[2] The entire premise of the Court's decision in *Boys Markets* was that employers will agree to submit to binding arbitration of union grievances only if unions are required to live up to their end of the bargain and refrain from striking while the process runs its course:

> Indeed, the very purpose of arbitration procedures is to provide a mechanism for the expeditious settlement of individual disputes without resort to strikes, lockouts, or other self-help measures. This basic purpose is obviously largely undercut if there is no immediate, effective remedy for those very tactics that arbitration is designed to obviate. 398 U.S. at 249.

It is precisely this policy that Morrell contends is frustrated by *Buffalo Forge*. Whether Morrell can invoke the Agreement's arbitration and grievance procedures is wholly irrelevant.[3]

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[2] Even the principal commentator cited by respondents (Resp. at 7 n.4) acknowledges that the critical issue in *Boys Markets* was whether an injunction was proper "when the strikes concerned grievances *the union* had agreed to settle by arbitration alone." Freed, *Injunctions Against Sympathy Strikes: In Defense of* Buffalo Forge, 54 N.Y.U. L. Rev. 289 (1979) (emphasis added).

[3] Nevertheless, Morrell does not agree that it cannot request arbitration, particularly in light of this Court's long-standing policy of resolving all doubts in favor of arbitration, *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960), and the Agreement's broad recognition of the need for peaceful resolution of *all* disputes. *See, e.g., H. K. Porter Co.* v. *Local 37, United Steelworkers of America*, 400 F.2d 691, 695 (4th Cir. 1968); *Laundry, Dry Cleaning and Dye House Workers Int'l Union* v. *Mahoney*, 491 F.2d 1029, 1032-33 (8th Cir.), *cert. denied*, 419 U.S. 825 (1974).

II. Blind Adherence To *Stare Decisis* Is Inappropriate Given The Paradoxical And Harmful Effects Of *Buffalo Forge*.

Respondents never mention, let alone refute, the most compelling reason for overruling *Buffalo Forge*—the intolerable and unwarranted paradox it created. (Pet. at 7, 11) Under *Boys Markets*, employers can enjoin strikes over issues that go to the core of their employees' terms and conditions of employment because those issues are generally arbitrable. Under *Buffalo Forge*, however, employers are powerless to compel employees to return to work where the strike is not only unrelated to a core issue, but has nothing to do with any dispute between the employer and the striking employees. Employers are deprived of the benefit of a union's no-strike promise precisely where that protection makes most sense, all because of the "artificial" reasoning of *Buffalo Forge*. *Jacksonville Bulk Terminals, Inc.* v. *International Longshoremen's Ass'n*, 457 U.S. 702, 730 (1982) (Powell, J., dissenting).

In addition to failing to account for this paradox, respondents do nothing to meet Morrell's showing that *Buffalo Forge* has undermined the three central policies articulated in *Boys Markets:* (1) enforcing collective bargaining agreements in general and no-strike clauses in particular, 398 U.S. at 252-53; (2) encouraging parties to agree to arbitration while avoiding judicial interference with the arbitration process, *id.* at 242-43; and (3) protecting concurrent state court jurisdiction, *id.* at 243-47. *Buffalo Forge* did not purport to limit—or even question—any of these policies. Nor do respondents question their applicability here. Experience has shown that *Buffalo Forge* frustrates each of them, upsetting the delicate balance struck in *Boys Markets* between Norris-LaGuardia and section 301 of the Labor Management Relations Act. (*See* Pet. at 12-22)

Respondents make no effort to defend this result. Instead, they simply allege that similar arguments "failed to carry the

day" in *Buffalo Forge.*[4] But Morrell's petition pointed out that *Buffalo Forge* should be overruled precisely because its adverse effect on national labor policy was not apparent when it was decided. Under these circumstances, adherence to *stare decisis* is not appropriate. As this Court recalled in *Boys Markets* when it overruled *Sinclair Refining Co.* v. *Atkinson,* 370 U.S. 195 (1962),

> *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.

398 U.S. at 241, quoting *Helvering* v. *Hallock,* 309 U.S. 106, 119 (1940) (Frankfurter, J.); *accord, Continental T.V., Inc.* v. *GTE Sylvania Inc.,* 433 U.S. 36, 47-48, 58 n.30 (1977).

The Court has been especially sensitive to the need to harmonize the scope of Norris-LaGuardia's prohibition against injunctions with subsequently enacted federal labor-relations statutes. Thus, this Court did not hesitate in *Boys Markets* to overrule *Sinclair,* even though it had been decided only eight years earlier, because *Sinclair* frustrated sound national labor policy. 398 U.S. at 241. Six years after that, the Court retreated by significantly limiting *Boys Markets* in its five-to-four decision in *Buffalo Forge.* Already this term, the Court has heard argument in a case involving the limits placed on Norris-

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[4] Respondents also assert that *Buffalo Forge* was later "reaffirmed . . . following plenary consideration" in *Jacksonville.* (Resp. at 9) Just the opposite is true. *Jacksonville* focused on an entirely different issue, and the Court simply declined an invitation to reconsider *Buffalo Forge* in a brief footnote, without any comment on the arguments presented. *Jacksonville,* 457 U.S. at 723 n.23. The issues and arguments Morrell raised in its petition have thus never been addressed by this Court, let alone given "plenary" consideration.

LaGuardia's prohibition on injunctions by the Railway Labor Act. *Burlington Northern Railroad Co.* v. *Brotherhood of Maintenance of Way Employees, argued Feb. 23, 1987,* 55 U.S.L.W. 3552 (U.S. Feb. 17, 1987) (No. 86-39). This case presents a similar opportunity to clarify Norris-LaGuardia's scope, here in actions involving section 301 of the Labor Management Relations Act.

The need for a comprehensive reexamination of *Buffalo Forge* is confirmed by the apparent uncertainty of several Justices on the issue. Experience since *Buffalo Forge* evidently persuaded former Chief Justice Burger to break ranks with the *Buffalo Forge* majority and join the dissenters in *Jacksonville,* urging that the doctrine be overruled because it is based on "mechanical and contradictory analyses." 457 U.S. at 729 (Burger, J., dissenting). By contrast, Justice Brennan, who dissented in *Buffalo Forge,* joined the majority in *Jacksonville,* although his reason for doing so was left unstated. Justice O'Connor, who became a member of the Court after *Buffalo Forge,* concurred specially in *Jacksonville* because she believed that the majority's conclusion was inescapable "[u]nless the Court is willing to overrule *Buffalo Forge.*" 457 U.S. at 724 (O'Connor, J., concurring). Under these circumstances, strict adherence to *stare decisis* is both unnecessary and wrong.

Apart from urging wooden application of *stare decisis,* respondents briefly challenge only isolated portions of Morrell's petition. (*See* Resp. at 10-12) For example, respondents claim that *Buffalo Forge* can be readily applied using what they call "certain easily-ascertained hallmarks of *almost* every sympathy strike." (Resp. at 11) (emphasis added) But respondents' qualification concedes that the "hallmarks" they recommend are not useful in close cases such as this where the international union orchestrated a strike by a local union from one Morrell plant against Morrell at another plant to try to do indirectly what it clearly would have been enjoined from doing directly. (*See* Pet. at 15-17, 19-20) The courts below evidently did not

find this issue to be an easy one, reaching opposite conclusions based on the same evidence.[5]

In sum, respondents are wholly unable to defend *Buffalo Forge's* adverse effect on the important national labor policies recognized in *Boys Markets*. Those untoward effects are most graphically demonstrated by how *Buffalo Forge* has given respondents an incentive to mislead this Court and the courts below concerning respondents' position on arbitration. As respondents concede, they initially sought to arbitrate the scope of the no-strike clause by filing a grievance against Morrell. (Resp. at 3) They asserted this pending grievance as a basis for denying the injunction in both the district court and court of appeals, ultimately convincing the Eighth Circuit that an injunction was unnecessary largely because the unions had "sought, not avoided, arbitration of the grievance." (A-7, 804 F.2d at 460. *See also* Pet. at 6 n.3, 21-22.) Then, as respondents again concede, they did a sudden about-face, successfully opposing Morrell's request for arbitration of the scope of the no-strike clause at the district court level. (Resp. at 4-5 n.3)

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[5] Respondents' claim that *Buffalo Forge* does not discourage arbitration is similarly unpersuasive. First, their argument is directed only to the effect on employers' willingness to agree to arbitration clauses and ignores the decision's broader adverse impact on the national policy favoring effective arbitration to resolve labor disputes. (Resp. at 11) That adverse effect is well-illustrated here. Second, with respect to the effect on employers' willingness to submit to arbitration, respondents ignore *Boys Markets'* observation that any incentive for employers to agree to submit disputes to arbitration is "*necessarily* dissipated" if injunctions are unavailable. 398 U.S. at 248 (emphasis added). The two isolated surveys ten years apart cited by respondents do not support a contrary conclusion. Indeed, both warn that "[c]aution. . .should be exercised in the comparison of figures in any current study with figures from a previous study." *See* BNA, *Basic Patterns in Union Contracts* at xii (11th ed. 1986); BNA, *Basic Patterns in Union Contracts* at 2 (8th ed. 1975).

Having succeeded in avoiding prompt resolution of their no-strike obligation by defeating both Morrell's motion for a preliminary injunction and its petition to compel arbitration, respondents incredibly tell this Court that Morrell has "stymied" their efforts to resolve the issue in the initial grievance steps. (*Id.* at 3)

Respondents have engaged in an elaborate shell game with the parties' arbitration clause. As a result, Morrell has been left with no meaningful way to enforce the no-strike clause, and the parties' agreement to arbitrate has been emasculated. If the unions seriously wanted to resolve the scope of the no-strike clause through arbitration, they could have done so long ago. The reason they are not proceeding with arbitration has nothing to do with Morrell, and everything to do with the disincentives created by *Buffalo Forge*.

Conclusion

This case presents this Court with a unique opportunity to correct what has proved to be a mistake and to restore the appropriate balance between the Norris-LaGuardia and Labor Management Relations Acts. For these reasons, Morrell respectfully submits that the petition should be granted.

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